Petition

81-919

No.

Office - Supreme Court, U.S.
FILED
NOV 13 1981
ALEXANDER L. STEVAS
CLERK

Supreme Court of the United States

October Term, 1981

JOHN MARTENS,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit in Criminal Action

PAUL P. RAO, Jr.
Attorney for Petitioner
210 East 61st Street
New York, NY 10021
(212) 964-8866

(GP—3729)

Question Presented.

Considering the following conduct by the prosecutor: the furtive instigation of a February 27, 1981 meeting between the petitioner, his counsel and the prosecutor, being fully aware at the time that plea negotiations of any sort had been categorically rejected on four prior occasions, in order to intimidate the petitioner with the prospects of imprisonment and to disparage the ability of counsel, in an attempt to unilaterally extract a guilty plea prior to the trial date of March 16, 1981, so that there would be no trial exposure of the government's major witness, until the finalization of an unrelated and pre-eminent criminal matter in which petitioner was uninvolved; the March 1981 pre-trial exploitation of the investigative and subpoena powers of the government, as to persons other than the petitioner, tangentially geared to pressure petitioner into accepting a guilty plea; the profane vilification of counsel in the courtroom, during a trial recess and in the presence of the petitioner, prior to the testifying of the Government's major witness; the imperious interference with counsel's court ordered interview of a federal prisoner, which bore upon petitioner's coercion defense; the failure to acknowledge the materially false testimony of a D.E.A. Agent, although it was patently contradicted by that Agent's prior sworn to complaint for the issuance of petitioner's arrest warrant, which was compounded by her strenuous support of that untruthful testimony during summation; the exploitation during the trial and in summation of a cooperation agreement, which had been repeatedly violated by the Government's major witness, albeit never cancelled in order to bolster the credibility of that witness; the misstatements in summation concerning the testimony of the government's expert witness as it pertained to a document, so as to deceptively argue that the document was fabricated and consequently, so was the defense; the assertions in summation of personal knowledge

as to "omerta," a matter not in the record, which were based upon the prosecutor's experience as an Assistant U.S. Attorney and related to the defense of coercion, and finally, the repeated distraction of the jury during counsel's 80 minute summation by periodically yawning at seven to nine minute intervals, the question is:

Whether the above prosecutorial misconduct, was sufficiently violative of petitioner's Sixth Amendment right to counsel and a fair trial under the constitutional standards enunciated in U. S. v. Morrison, in that it affected the quality and effectiveness of petitioner's legal representation and adversely impacted upon the fairness of the proceedings leading to the conviction, so as to have warranted either the extreme sanction of the dismissal of the indictment or the lesser remedy of a new trial.

Table of Contents.

	Page
Question Presented	i
Opinions Below	1
Jurisdiction	1
Constitutional Provisions	2
Statement of Facts	2
Reasons for Granting the Writ	11
I. The holding of the Ninth Circuit in U. S. v. Clover, 596 F. 2d 857, 861-2, cert. denied 444 U. S. 869 (1979), which was cited with approval in U. S. v. Morrison, *supra,* 101 S. Ct. 669 note 4, differs with the Second Circuit as to what constitutes a degradation of counsel and intimidation of the petitioner sufficient to warrant a dismissal of the indictment	12
II. The question raises an issue of public importance in the administration of justice	14
III. The decision below is inconsistent with this Court's decision in the U. S. v. Berger, 29 U. S. 78, 88, 55 S. Ct. 629, 635, 79 L. Ed. 1314 (1935)	16
IV. An issue raised by the question is of continuing importance and should be resolved by this Court	17

Page

V. The Court of Appeals for the Second Circuit has decided a federal question of substance in a way most probably not in accord with applicable decisions of this Court 19

VI. The question brings before this Court an issue which frequently recurs, being of continuing importance and which the Court has not yet decided 21

VII. The decision below is in conflict with earlier decisions of the same court and with decisions of this Court 22

VIII. The decision below is squarely in conflict with the Herring decision by this Court 23

Conclusion 25

Appendix A 1a

Appendix B 1b

Appendix C 1c

Appendix D 1d

Appendix E 1e

TABLE OF AUTHORITIES.

CASES:

Alcorta v. Texas, 355 U. S. 28, 78 S. Ct. 103, 2 L. Ed. 2d (1957)..... 11, 20

Page

Bordenkircher v. Hayes, 434 U. S. 357, 98 S. Ct. 663 (1978) 13

Durbin v. U. S., 221 F. 2d 520, 522, 94 U. S. App. D. C. 415 (1954) 16

Giglio v. U. S., 405 U. S. 150, 153, 92 S. Ct. 763, 31 L. Ed. 2d 104 (1972) 11, 20

Gregory v. U. S., 125 U. S. App. D. C. 140, 369 F. 2d 185, 188 (1966) 19

Herring v. New York, 422 U. S. 853, 862, 95 S. Ct. 2550, 2555, 45 L. Ed. 2d 593 (1975) 11, 24

Napue v. Illinois, 360 U. S. 264, 79 S. Ct. 1173, 3 L. Ed. 2d 1217 (1959) 11, 20

United States v. Morrison, 449 U. S. 361, 101 S. Ct. 665 (1981) 11

U. S. v. Artuso, 618 F. 2d 192, 197, note 4 (2nd Cir. 1980) 21

U. S. v. Berger, 295 U. S. 78, 55 S. Ct. 629, 79 L. Ed. 1314 (1935) 16

U. S. v. Bowens, 318 F. 2d 828, 829 (7th Cir.), cert. denied 375 U. S. 911 (1963) 18

U. S. v. Broward, 594 F. 2d 345, 351, 2nd Cir., cert. denied 442 U. S. 941 (1979) 20

U. S. v. Burse, 631 F. 2d 1151, 1155 (2d Cir. 1976).. 23

Page

U. S. v. Leonard, 524 F. 2d 1076, 1092 (2nd Cir. 1975) 18

U. S. v. Matlock, 491 F. 2d 504, 506 (6th Cir. 1974), cert. denied 419 U. S. 864, 95 S. Ct. 119, 42 L. Ed. 2d 100 (1974) 18

U. S. v. Minnesota Mining and Mfg. Company, 551 F. 2d 1106, 1112 (8th Cir. 1977) 21

U. S. v. Suarez, 588 F. 2d 352, 354 (2nd Cir. 1978) .. 22

U. S. v. White, 454 F. 2d 435, 438-439 (7th Cir. 1971), cert. denied 405 U. S. 962, 92 S. Ct. 2070, 32 L. Ed. 2d 350 (1972) 18

CONSTITUTIONAL PROVISIONS AND STATUTES:

6th Amendment 2

28 U.S.C. 1254(1) 1

OTHER AUTHORITIES:

Wright, 1969, Federal Practice and Procedure, Sect. 273, pgs. 546-547 16

No. .

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981.

JOHN MARTENS, ,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit in Criminal Action.

Opinions Below.

There was no formal or reported opinion by the United States Court of Appeals for the Second Circuit; but the informal and unreported opinion appears at Appendix A. There was no formal or reported opinion by the United States District Court.

Jurisdiction.

The judgment of the United States Court of Appeals for the Second Circuit, affirming the judgment of conviction of the petitioner, was entered on September 16, 1981. This petition for certiorari was filed less than sixty (60) days from the date aforesaid. The jurisdiction of this Court is invoked under 28 USC 1254(1).

Constitutional Provisions.

This case involves the Sixth Amendment to the United States Constitution which reads as follows:

> JURY TRIAL FOR CRIMES, AND PROCEDURAL RIGHTS.
>
> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, *and to have the Assistance of Counsel for his defense.*

Statement of Facts.

I

The petitioner, a doctor of bariatrics, was arrested on August 19, 1980 for the distribution of dilaudid. Within a month-and-a-half after his arrest and prior to his indictment, the Government rejected an offer from petitioner's previous attorney for a plea to a charge carrying the maximum term of five years imprisonment. In the middle of October, petitioner retained present counsel who never attempted to negotiate a plea; not even after a five count indictment was returned on November 17, 1980.

At the first pre-trial conference on December 4, 1980, in response to the Government's inquiry, defense counsel categorically informed the prosecutor that the petitioner would not enter into any plea negotiations whatsoever.

The trial date was set for December 16. On December 9 the Government requested an adjournment from the court and the trial was tentatively rescheduled for February 11, 1981. Once again in reply to a query from the prosecutor, defense counsel unequivocally asserted that the petitioner had no intentions of accepting any guilty plea. Then on February 11, 1981 the trial date was firmly fixed for March 16, 1981 and once more in answer to an inquiry from the prosecutor, defense counsel firmly stated that the petitioner would not enter into any plea arrangements.

The prosecutor thereafter made two unsolicited calls to defense counsel. During the first call of February 20, 1981, nine days after petitioner's request to charge had been filed, the prosecutor stated that the defense of coercion was inapplicable, since two prior prosecutors had found it meritless (TR 1167) and that the petitioner should consider a plea which would have to be effectuated two weeks before trial. For the fourth time, defense counsel unqualifiedly asserted that there would be no plea negotiations, while subsequently informing the petitioner of the substance of that telephone conversation. Then on February 26, the prosecutor made another unsolicited call to defense counsel. The prosecutor requested counsel to come to her offices with the petitioner on February 27. When defense counsel inquired as to the reason for the conference, the prosecutor stated that she would prefer not to discuss it on the phone (TR 1168).

At the meeting on February 27, the prosecutor told the petitioner that he would be uncharacteristically permitted to plead to a five-year count to cover the five fifteen-year counts in the indictment, even though the case was "overwhelming" against him (Government's Pre-trial Memo; Appendix B at p. 2b). Defense counsel advised her that there would be no plea since the petitioner had a defense

of coercion to the charges and that he would not have accepted the case if he thought that the petitioner "should plead guilty" (TR 1169). The prosecutor then stated directly to the petitioner that defense counsel "never had his clients plead guilty, but that the decision had to be made by Martens since it was Martens and not his attorney who would suffer the consequences" (Government's Pretrial Memo; Appendix B at p. 1b). She stated that "the decision he would make not only affected himself but would affect people he was close to" (TR 1169) and that the "most recent person that Mr. Rao had represented (TR 1170) . . . had been offered an opportunity to plead guilty . . . and that [Rao] rejected that . . . but that she (Rao's former client) was convicted after trial and was now sitting in jail even though she hadn't been sentenced and that that case wasn't half as strong as the case against Dr. Martens" (TR 1171). Defense counsel noted that two of his recent Southern District trials had not resulted in convictions and rhetorically questioned whether the prosecutor had ever lost a case. The prosecutor responded that she had never lost a case (TR 1168) and that the U.S. Attorney's Office had over a ninety per cent conviction rate (TR 1169). Without any further discussion, petitioner and counsel departed.

The motivation for these unsolicited calls and the concealed nature of the meeting was admitted by the Government. It was to extract a guilty plea from the petitioner, so that the Assistant United States Attorney could shield the major witness for the Government, Dr. Asherson, from trial exposure in the petitioner's case, so as to unveil him at a unrelated and paramount prosecution under investigation as against the owners of a clinic for which Asherson was the medical director (TR 1172) and in which investigation petitioner was totally uninvolved.

II

Within days after this meeting of February 27, the Government began interviewing patients of the petitioner as to medical treatment they received which was unrelated to the dilaudid charges in the indictment (TR 1173). Then on March 4, Grand Jury subpoenas were served on the petitioner's sister, Mrs. Rita Fratrick, and her close friend, Kitty Dries, which directed them to proceed to the U. S. Attorney's Office, ostensibly to collect mileage fees. When at the U. S. Attorney's office, petitioner's sister, upon advice of other counsel, refused to speak to the prosecutor who was informed by the attorney that Mrs. Fratrick would plead the Fifth Amendment when brought before the Grand Jury. Kitty Dries, who was not represented by counsel, did in fact speak to the prosecutor. Both were never brought to the Grand Jury ante room or before the Grand Jury itself (TR 1177), but were nevertheless compelled to have their photographs and fingerprints taken (TR 1178).

III

On the first day of trial, after the opening arguments and during a recess, the prosecutor made a blasphemously derogatory remark to defense counsel "Mr. Rao you are goddamned obnoxious." The prosecutor was later unable to specify the reason for this statement and incapable of recalling that the petitioner was present at the time it was made (TR 1179-1180). As of that time, Dr. Asherson had not yet been called as a witness.

IV

Dr. Asherson, the major witness for the prosecution, testified he had entered into a written cooperation agreement with the Government (Appendix C). This argument

was violated by his subsequent purchase of cocaine once every two weeks (TR 302). This dishonored agreement was entered into evidence by the prosecution to bolster the credibility of Asherson. Moreover, the prosecution in summation further exploited this breached agreement to discount any possibility of Asherson's having testified untruthfully, by referring to the fact that he had no "motive" to falsify since he already had "immunity" for all his prior "crimes"; that his truthful "cooperation" was essential for him at the time of his sentence; and that if he had committed "another crime," the agreement would be "ripped up" (TR 1057-1058). In short, the government was able to affirm that Asherson "made a commitment to tell you the truth and the Government submits he stuck with that commitment" (TR 1110).

V

On the third day of trial the Court ordered the prosecutor to produce a federal prisoner, Frank Cafaro, whom the prosecutor had already interviewed, so that defense counsel could question him and explore the possibility of calling him as a witness. The necessity for the interview arose from Asherson's testimony that the clinic he supervised received syndicate protection and that when Cafaro once tried to blackmail him, Asherson had arranged through one of the owners of the clinic to have Cafaro killed, maimed or threatened by "Mr. O'Neil" a person in the high echelons of the mafia (TR 183-191). Consequently, the interview would have shed light upon the testimony of the petitioner that Dr. Asherson threatened his life and that of his sister's and her family with the syndicate, in order to coerce him into providing dilaudid (TR 443-445).

Defense counsel was initially supposed to see Cafaro in the third floor detention cell (TR 103). An unexpected

telephone call from the prosecutor offered defense counsel the opportunity to speak to Cafaro in a room at the U.S. Attorney's Office on the seventh floor, since counsel was to visit the prosecutor that very morning to deliver subpoenaed materials (TR 1186).

When defense counsel went to the U.S. Attorney's Office, he was only permitted to meet Cafaro in the hallway within the seventh floor offices of the U.S. Attorney, being advised by the prosecutor, in the presence of two agents, that no room was available and that Cafaro did not wish to speak to him (TR 1187). As other persons continuously passed them in the hallway, defense counsel finally convinced Cafaro to at least extend him the courtesy of telling him in private that he refused to speak to him.

When defense counsel again asked for a room in which to speak to Cafaro, an agent escorted him and Cafaro to the ninth floor and the three remained in an entrance foyer, since every room was occupied. Although the agent was on the other side of the small entrance foyer and could not overhear what was being said, he had unimpeded eye contact with Cafaro. In briefly speaking to Cafaro, defense counsel immediately ascertained for himself that the interview would indeed prove fruitless, an expectation he had already anticipated due to the circumstances preceding it.

VI

During the trial, DEA Agent Guillen testified that when he went to the apartment of Dr. Asherson on April 30, 1980, in his undercover capacity as Ed Lauri, a drug dealer, to purchase 200 dilaudids from the petitioner, he was not acting in an undercover capacity as a person with "connections to organized crime" (TR 402-403).

However, on August 12, 1980, Agent Guillen signed a complaint under oath for the arrest of the petitioner (Appendix D), which was introduced into evidence by the defense (TR 405). In that affidavit Agent Guillen had patently contradicted his trial testimony by swearing to the following: "On April 30 *while acting in an undercover capacity* as a wholesale drug dealer and *a person with connections to organized crime* I purchased 200 dilaudid tablets from the defendant, John Martens, for $2,000 in official advance funds."

The trial court stated, in sustaining an objection to a question on cross-examination of Agent Guillen regarding his acting as a member of organized crime, "Yes, I don't think he said he represented himself. He has denied that he has represented himself" (TR 407). When counsel noted "But the affidavit is in now Judge, in evidence," the Court responded "I know. But he has denied he did" (TR 407-408). Defense counsel subsequently requested the Court to include a perjury instruction in his charge, because of the testimony of the agent (TR 670), but the Court declined to do so (TR 887-880).

There was other testimony by the two major witnesses for the Government in regard to whether or not Agent Guillen was acting in an undercover capacity as a person with connections to organized crime. Agent Guillen testified that prior to the meeting at Asherson's apartment, he told Asherson he would hold himself out to be "an Italian" (TR 408). However, Asherson testified that there was no such "discussion," but that "on the spur of the moment" he himself mentioned it at that meeting so that "there was no connotation to it whatsoever" (TR 77).

To support the trial testimony of Agent Guillen, which had contradicted his affidavit, the prosecutor in her summation asserted that "Mr. Rao keeps trying to bring

organized crime into this case but organized crime is not part of this case" (TR 1115). While mentioning "the defense's contention" that Guillen represented organized crime (TR 1039), the prosecutor dismissed such a claim by stating that if Agent Guillen was "a member of organized crime," he would never have acted in a certain way (TR 1044) or would have always been able to act in a certain way (TR 1050-1051).

VII

During the trial the petitioner testified that Asherson had given him a sheet of paper on April 17, 1979 on which Asherson had written the names of doctors the petitioner could contact in an exigent situation while covering Asherson's practice. On this paper was a notation written by the petitioner with a pen containing liquid black A ink, which indicated Asherson's itinerary, so that the petitioner could reach him in the case of an emergency (Appendix E). This paper became a joint exhibit, when it was introduced into evidence.

In the Government's rebuttal case, an expert witness testified on direct examination that in July and August of 1977, twenty-one months before the writing on the paper by the petitioner, over 41,840 dozen pens (501,080) with liquid black A ink were commercially available in stores in various cities as a field test and that in the fall of 1979 it became commercially available on a full scale basis (TR 962-963). One of those cities was Philadelphia and it had been visited by the petitioner in 1977 or 1978 (TR 571). Defense counsel objected to the pen and ink testimony, but it was overruled (TR 963-964).

During the prosecutor's summation she made the following flagrant misstatements as to the expert's testimony which counsel objected to after she had concluded her rebuttal summation (TR 1126):

> *"It wasn't commercially manufactured until May 30, 1979 and it wasn't available in pens on the market that somebody could buy in a store until the fall of 1979, many months after this alleged conversation.* You have heard also that *there were a few samples of this pen made available in cities around the United States.* The defendant during his cross examination by me *denied going to any of those cities* and anyway it was small quantities so the odds of it having been one of those pens are fantastic. The Government submits, ladies and gentlemen, that you have seen fabricated evidence before you and this document is one piece of that" (TR 1018-1019).
>
> "He has fabricated evidence for your benefit. The most dramatic perhaps is this document, totally fabricated, totally unnecessary, a total fraud on you and on this trial. *The ink with which it was written was not even commercially available until months after he testified that document was written"* (TR 1053).

Also in her summation the prosecutor sought to refute the fact that the petitioner believed Agent Guillen to be a member of organized crime at the time he met him at Asherson's apartment. She mentioned that the petitioner had asked for reassurances from Agent Guillen to the effect that he would not be subjected to criminal liability when Agent Guillen resold the pills. The prosecutor made the following remarks as to "omerta," a fact not in the record which was objected to after her rebuttal summation:

> "Secondly do you ask them (organized crime) 'Are you going to protect me? Are you going to make sure it doesn't come back to me? I mean, he [the defendant] seems to know an awful lot about

organized crime. *Doesn't he know about omerta, the code of silence. Ed Guillen, if a member of organized crime, would never turn around and finger John Martens"* (TR 1044).

VIII

Finally, during the summation of petitioner's counsel the prosecution repeatedly yawned at eight to nine minute intervals. The prosecution admitted that this was done (TR 1190), but stated she was "sick," "under medication" and "tired." The prosecution had not oscitated during her eighty minute summation and twenty minute rebuttal summation.

A motion either to dismiss the indictment or to order a new trial, which incorporated I, II, III, V, VII and VIII was denied by the District Court at the conclusion of the proceedings (TR 1157-1198).

Reasons for Granting the Writ.

The informal and unreported opinion of the Court of Appeals for the Second Circuit, which held that the petitioner "has not shown prosecutorial misconduct sufficiently prejudical to warrant" reversal of the conviction or a dismissal of the indictment, is in conflict with the standards which this Court has enunciated in *United States v. Morrison,* 449 U. S. 361, 101 S. Ct. 665 (1981), *Herring v. New York,* 422 U. S. 853, 862, 95 S. Ct. 2550, 2555, 45 L. Ed. 1314 (1935), *Alcorta v. Texas,* 355 U. S. 28, 78 S. Ct. 103, 2 L. Ed. 2d (1957) and its progeny *Napue v. Illinois,* 360 U. S. 264, 79 S. Ct. 1173, 3 L. Ed. 2d 1217 (1959) and *Giglio v. U. S.,* 405 U. S. 150, 153, 92 S. Ct. 763, 31 L. Ed. 2d 104 (1972). Moreover, it is in conflict with other circuits, those cases being mentioned below.

I

The holding of the Ninth Circuit in *U. S. v. Clover*, 596 F. 2d 857, 861-2, cert. denied 444 U. S. 869 (1979), which was cited with approval in *U. S. v. Morrison, supra*, 101 S. Ct. 669 note 4, differs with the Second Circuit as to what constitutes a degradation of counsel and intimidation of the petitioner sufficient to warrant a dismissal of the indictment.

As a result of the prosecutor's furtive instigation of a meeting between herself, the petitioner and his counsel, the nature of which the prosecutor concealed, the petitioner's confidence in the judgment and ability of his counsel was diminished and an overpowering fear of imprisonment and defeatism was instilled in him. This unnerved the petitioner and caused a strained relationship between him and his counsel which adversely impacted upon his legal representation.

The belittlement of defense counsel by attacking his competency through the mentioning of a recent defeat which resulted in the imprisonment of a former client in a weaker case and by questioning counsel's good faith in implying some egotistical desire of his to try all cases even if it be to the detriment of a client, served to raise doubts about his effectiveness and to undermine trust in him. Furthermore, the prosecutor's boasting of her invincibility and the bragging as to her office's high record of success, were designed not only to inculcate fear into the petitioner, but also to have him abandon his defense and counsel. This was a deliberate attempt to sever or otherwise interfere with the attorney-client relationship, especially considering counsel's repeated statements on four separate occasions that there would be no plea negotiations.

The Ninth Circuit in *U. S. v. Clover, supra,* at page 861, noting that in fact there had been "no indication" of any disparagement of counsel, so as to create the possibility of "lingering doubts caused by the imputations on counsel's competence" refused to dismiss an indictment, but held the following:

> "The effects of disparaging comments about counsel, particularly when coupled with a warning that reliance on counsel's judgment will not keep the defendant out of jail, can be detrimental to the attorney-client relationship and are not easily dispelled. Under such circumstances a defendant may be deprived of the right to counsel."

The Court of Appeals for the Second Circuit referred to *Bordenkircher v. Hayes,* 434 U. S. 357, 98 S. Ct. 663 (1978), in deciding that "the actions of the prosecution during plea negotiations amount to legitimate attempts to convince appellant of the advisability of a guilty plea." However *Bordenkircher* is inapposite, since in that case, totally unlike the instant one, there was the knowing and willful give and take of plea bargaining between the parties, which resulted in a guilty plea, as well as a superceding indictment.

In the instant case plea negotiations were attempted by petitioner's previous counsel, but the Government had unequivocally rejected them sometime before October 1, 1980 and they were never resumed by that counsel. Moreover when present counsel was retained in the middle of October, he never attempted to plea negotiate and after the indictment was returned, categorically rejected any plea bargaining on three subsequent occasions, December 4 and December 9, 1980, as well as February 11, 1981. The petitioner's unwaivering position was again declared during an unsolicited call by the prosecutor on February 20.

Although fully aware of the petitioner's position, the prosecutor did not act forthrightly in her second unsolicited call on February 26, which deceptively arranged for an opportunity to unilaterally extract a guilty plea from petitioner at a meeting on February 27. Moreover, the arbitrary reason for this intrusive prosecutorial maneuver was to have the Government's principal witness, Dr. Asherson, make his trial debut at an unrelated prosecution of greater magnitude which had not yet been finalized and in which the petitioner was not a party.

The prejudice which resulted is unable to be eliminated by a new trial, since the stultified testimony of the petitioner cannot be corrected without unfairly creating the appearance of perjury. Moreover, the Court below should have exercised its supervisory power to deter a widespread prosecutorial practice, whereby the rights of one defendant in a non-celebrated case are trampled upon in order to insure a victory against some other defendant in a non-related case susceptible of maximum acclaim.

II

The question raises an issue of public importance in the administration of justice.

Within days after the meeting of February 27, the Government persisted in its campaign to compel the petitioner to enter into a guilty plea prior to the March 16 trial date. The prosecutorial *modus operandi* consisted of a two-pronged attack which demonstrated a vindictiveness that would consistently reappear throughout the proceedings.

Firstly, patients of the petitioner were interviewed as to matters not associated with the charges in the indictment (TR 1173). The prosecutor claimed that this "was part of our pre-trial efforts to learn more about John Martens

and his practice" and was not "improper" (TR 1173-1174). It nevertheless disrupted petitioner's profession, curtailed his associations and subjected him to public obloquy, thereby harassing, humiliating and distracting him during his preparation on the very eve of trial.

Secondly, when this failed to extract a guilty plea, petitioner's sister, Mrs. Fratrick, and her close friend, Miss Kitty Dries were subpoenaed to testify on March 4 before a Grand Jury, being directed on the subpoenas to proceed to the prosecutor's office for "mileage fees." Mrs. Fratrick's attorney apprised the prosecutor at her office that, Mrs. Fratrick would not speak to her and would plead the Fifth Amendment when brought before the Grand Jury. Miss Dries appeared without counsel and did speak to the prosecutor. Both were never brought before the Grand Jury, but were required to have photographs and fingerprints taken.

The Government on April 30, 1980, was in possession of checks the petitioner's sister had endorsed which Asherson had given to the petitioner in payment of dilaudid. However, ten months later and twelve days before trial, Mrs. Fratrick was subpoenaed. This was done to intimidate her, while the subpoenaing of her close frind was a further form of additional pressure on her. Both actions adversely impacted upon the petitioner and his defense, since Mrs. Fratrick became unnerved and frightened, so that her corroborating testimony at trial was hampered by these machinations. Moreover, the petitioner's testimony was affected by his apprehension for his sister.

The timing of and the purpose for the interviews of the petitioner's patients, as well as the timing of the subpoenas and the particular individuals served, rendered both actions inherently suspect. They served to give a tactical advantage to the Government over the accused and his legal representation.

The Government is not authorized "to subpoena a witness and require him to report at some time or place other than where the hearing is to be held at which he is to testify." Wright, 1969, Federal Practice and Procedure, Sect, 273, pgs. 546-547. In *Durbin v. U. S.*, 221 F. 2d 520, 522, 94 U. S. App. D. C. 415 (1954), the Court refused to "recognize the United States Attorney's Office as a proper substitute for the Grand Jury Room" holding:

> "It was clearly an improper use of the district court's process for the Assistant United States Attorney to issue a grand jury subpoena for the purpose of conducting his own inquisition."

Since the prosecutor referred to the "customary practice of our office" as to the procedures followed regarding the subpoenas and since she considered the interviewing of petitioner's patients not to be "improper" (TR 1174), the dismissal of the indictment was warranted to deter a widespread or continuous abuse of the process of the District Court.

III

The decision below is inconsistent with this Court's decision in the *U. S. v. Berger*, 295 U. S. 78, 88, 55 S. Ct. 629, 635, 79 L. Ed. 1314 (1935).

Having still failed to pressure the petitioner to plead guilty, the prosecutor, on the first day of trial and after opening arguments, made a vituperative remark to defense counsel in the courtroom outside the presence of the jury and in the presence of the petitioner. Her impiously derogatory statement was a "foul" blow rather than a "hard" one, *U. S. v. Berger, supra*, 295 U. S. 88, 55 S. Ct. 633, especially since she knew from defense counsel's opening that the petitioner would be testifying at trial.

Since the petitioner realized that there was no justification for the remark, as is evidenced by the fact that the prosecutor was unable to give one to the trial court, he was deeply intimidated by it. The petitioner intensely feared that the prosecutor's unjustified antagonism was actually being directed at him and would just as unfairly manifest itself when he testified. This feeling was logically compounded by the fact that the prosecutor had already expressed to the petitioner her desire to avoid having the trial in the first place. Moreover, the petitioner believed that if the jury should convict him the prosecutor's unwarranted animosity would reflect itself at the time of his sentencing. Consequently since Dr. Asherson had not yet testified, the petitioner contemplated pleading guilty, so as to avoid further prosecutorial wrath. All in all, the quality of the petitioner's testimony was adversely affected by that remark.

The prejudice created by this outlandish behavior would continue at a new trial since to correct petitioner's trial testimony would only redound to the petitioner's detriment. Moreover, the often repeated warnings by the courts of all Circuits, as well as this Court, concerning the demeanor of a prosecutor during a trial have gone unheeded and at least justified a new trial to deter such flagrant misconduct.

IV

An issue raised by the question is of continuing importance and should be resolved by this Court.

The hostile attitude of the prosecutor again displayed itself when the Court ordered the government to make Cafaro, a federal prisoner, available to defense counsel. The ostensible courtesy afforded defense counsel in having Cafaro interviewed at the prosecutor's office rather than in a detention cell, was part of a scheme to interfere with

that interview. When defense counsel arrived at the prosecutor's office, she explicitly demonstrated to Cafaro her displeasure over the prospect of any interview, by the awkward location of the meeting being set in a hallway, by the incredible unavailability of a room, by the awesome presence of herself and two agents, by her assertion that Cafaro had no wish to speak to counsel, by the continued failure to provide a room even after Cafaro consented to a private meeting to personally inform counsel of his decision and by the continued presence of an agent even at that meeting.

Obviously, when the prosecutor interviewed Cafaro, she was unencumbered by defense counsel. Nevertheless, the prosecutor frustrated the efforts of defense counsel to have a fair and equal opportunity to interview Cafaro. At the very least, there was a suppression of the means by which defense counsel might have obtained evidence of an extremely material and highly relevant nature. Cafaro could have had personal knowledge as to Asherson's association with the underworld, since Cafaro had been threatened by the Mafia because of his attempted blackmail of Asherson. Moreover, Asherson had spoken to Cafaro after he had arranged to have the syndicate resolve his problem and before the syndicate had in fact acted (TR 190-191).

U. S. v. Leonard, 524 F. 2d 1076, 1092 (2nd Cir. 1975), cited *U. S. v. White,* 454 F. 2d 435, 438-439 (7th Cir. 1971), cert. denied 405 U. S. 962, 92 S. Ct. 2070, 32 L. Ed. 2d 350 (1972), and *U. S. v. Matlock,* 491 F. 2d 504, 506 (6th Cir. 1974), cert. denied 419 U. S. 864, 95 S. Ct. 119, 42 L. Ed. 2d 100 (1974), as to "how far the prosecutor may go in discouraging witness from being interviewed by defense counsel." Indeed, the Government may inform the witness of his right to decide whether to grant or refuse an interview, *U. S. v. Bowens,* 318 F. 2d 828, 829 (7th

Cir.), cert. denied 375 U. S. 911 (1963); but a witness is not the property of either side, *Gregory v. U. S.*, 125 U. S. App. D. C. 140, 369 F. 2d 185, 188 (1966). It is significant to note that none of the witnesses in the cases cited above was a federal prisoner as was Cafaro, who psychologically and physiologically considered himself to be the property of the Government.

The prejudice to the petitioner cannot be rectified at a new trial, since Cafaro is clearly aware of the U. S. Attorney's position and certainly would not want to antagonize that office. This justified a dismissal of the indictment, or at least a new trial.

V

The Court of Appeals for the Second Circuit has decided a federal question of substance in a way most probably not in accord with applicable decisions of this Court.

In furtherance of the Government's acrimony, the prosecutor ignored the patent contradiction elicited during the cross examination of Agent Guillen in view of his prior sworn to complaint, regarding his having represented himself to be a member of organized crime. The prosecutor decided not to acknowledge the falsity of this testimony even after having been granted a recess at the conclusion of the Agent's cross-examination and prior to his redirect. Permitting the jury to consider that false testimony as being true, materially affected petitioner's right to a fair trial since it concerned the crux of the coercion defense—that Asherson, based upon his admitted connections with organized crime, used the threat of the syndicate, represented by Guillen, to compel the petitioner to provide dilaudid.

On the one hand, defense counsel was utterly powerless to categorically establish that the testimony was false,

especially since the Court noted Guillen had denied the contents of the complaint and refused to give a perjury instruction in its charge. On the other hand, the prosecutor in her summation, unequivocally dismissed the allegation that Agent Guillen had held himself out to be a member of organized crime (TR 1039, TR 1044 and TR 1050-1051).

A prosecutor should not sit idly by and allow the false testimony of a government witness to be considered as truthful by the jury. *Napue v. Illinois,* 360 U. S. 264, 269, 79 S. Ct. 1173, 1177, 3 L. Ed. 2d 1217 (1959); *Giglio v. U. S.,* 405 U. S. 150, 153, 92 S. Ct. 763, 765, 31 L. Ed. 2d 104 (1972). In the instant case, not only would truthful testimony have cast doubt on the Agent's credibility as well as that of Asherson's, but also it would have corroborated the petitioner's theory of defense, so that the perjury was all the more pernicious. *Alcorta v. Texas,* 355 U. S. 28, 31-32, 78 S. Ct. 103, 2 L. Ed. 2d (1957). In short, there was more than a reasonable likelihood that the false testimony affected the jury, considering that it concerned the credibility of the two key witnesses upon whom the government's case depended. *Giglio v. U. S., supra,* 405 U. S. 154-155, 92 S. Ct. 766.

The United States Court of Appeals for the Second Circuit, in light of the decisions of this Court, has differed rather than deferred in stating that "appellant's other claims of prosecutorial misconduct are without merit." The prejudice created cannot be eliminated by a new trial, since Guillen's testimony will again be required and will not be changed, lest it corroborates the petitioner's theory of defense. Moreover, the deterrence of this form of conduct by an agent, which was repeated in spite of the admonition in *U. S. v. Broward,* 594 F. 2d 345, 351, 2nd Cir., cert denied 442 U. S. 941 (1979), necessitated a dismissal of the indictment.

VI

The question brings before this Court an issue which frequently recurs, being of continuing importance and which the Court has not yet decided.

Just as a cooperation agreement should be honored by the Government when its conditions are faithfully met, *U. S. v. Minnesota Mining and Mfg. Company,* 551 F. 2d 1106, 1112 (8th Cir. 1977), lest an indictment be dismissed, *U. S. v. Artuso,* 618 F. 2d 192, 197, note 4 (2nd Cir. 1980), so also it should not be honored by the government when its conditions are deliberately violated. The Government felt no obligation to prosecute Asherson for his immunized prior crimes under a cooperation agreement he violated, as well as for those crimes committed after the signing of that agreement, irrespective of the terms of the agreement (Appendix C at p. 2c). However, it was the Government's responsibility not to conveniently exploit the clauses in a breached cooperation agreement as to the giving of truthful testimony (Appendix C at pp. 1c, 2c), so as to use it as an infallible safeguard for the veracity of Asherson. To capitalize upon a breached cooperation agreement by placing it into evidence and by exploiting it in summation, so as to place the imprimatur of truth upon Asherson's testimony, deprived the petitioner of the effective assistance of counsel and a fair trial, since it was Asherson's credibility vis-a-vis the petitioner's, which was the determining factor of the case.

A prosecutorial practice of conveniently overlooking breaches of cooperation agreements by government witnesses necessitated the deterrence of the indictment's dismissal. On the other hand, the prejudice to the petitioner would continue at a new trial, lest the government nullifies that agreement, so that a dismissal of an indictment was warranted.

VII

The decision below is in conflict with earlier decisions of the same Court and with decisions of this Court.

During the prosecutor's summation there were two highly prejudicial areas of comment. Firstly, there was the contortion of the objected to testimony (TR 963-964) of a Government witness as to the ink on a piece of paper on which the petitioner had penned the itinerary of Asherson. The totally inaccurate remarks as to the nonavailability of the pens in stores until 1979, that the petitioner had not been at a city where the pens could be purchased, and that the ink was not available until months after the document was written, presented a twisted argument to the jury and implanted false facts in their minds. *U. S. v. Suarez,* 588 F. 2d 352, 354 (2nd Cir. 1978). The prosecutor further exploited this piece of paper by reasoning that since the document was fabricated, so also the defense of coercion was fabricated. These statements were designed to mislead the jury and affected substantial rights of the petitioner by depriving him of a fair trial and effective assistance of counsel.

Secondly, the petitioner's defense of coercion was based on the death threats of Asherson, which were to be implemented by the syndicate with which Guillen was associated. In this regard, the prosecutor argued that if the petitioner truly believed that Agent Guillen was a member of organized crime, he would not have been concerned with any repercussion from the sale of dilaudid to Guillen, since the code of "omerta" would have protected him. This remark by the prosecutor wherein she claimed personal knowledge of facts not introduced into evidence, namely, "omerta," were prejudicially inflammatory. The prosecutor's statements placed the full impact of the awesome prestige of the U.S. Attorney's Office behind it.

Her assertions indicated with crystal clarity to the jury that based upon the prosecutor's knowledge of the underworld as an attorney for the Government, the defense of coercion was inapplicable to the charge. In short, she was speaking as an expert upon matters outside the record.

As the Second Circuit held in *U. S. v. Burse*, 531 F. 2d 1151, 1155 (1976):

> "It should go without saying that successful—even zealous—prosecution does not require 'improper suggestions, insinuations and especially, assertions of personal knowledge.' *Burger v. U. S.*, 295 U. S. 78, 88, 55 S. Ct. 629, 633, 79 L. Ed. 1314, 1321 (1935)."

Consequently, the repeated indifference shown by prosecutors to the countless admonitions of Federal Appellate Courts, as well as to the warnings by this Court, regarding their conduct during summation, justified the deterrent effect of at least a new trial.

VIII.

The decision below is squarely in conflict with the *Herring* decision by this Court.

The hostility of the prosecutor displayed itself for the last time during defense counsel's summation. Her repeated and periodic yawning at seven to nine minute intervals during the 80 minute summation of counsel, deprived the defense of a fair, full and equal opportunity to make an argument. While there were times that this behavior interfered with the connected argument of counsel, at all times it distracted the steady concentration by the jury from the thread of that argument. The focus of

attention moved from counsel's argument to the prosecution's oscitation, as she improperly demonstrated to each juror her total disbelief in counsel's view of the law and the facts. This seriously prejudiced the presentation of the defense to the jury and deprived the petitioner of the effective assistance of counsel during a crucial phase of the trial. Moreover, the prosecutor's summation which was bereft of oscitation, commenced at 1:32 p.m. and terminated at 2:52 p.m. It was difficult enough for counsel to maintain the attention of the jury at the end of the long day, without having the prosecutor exacerbate the existing condition by such shameless misconduct.

In *Herring v. New York,* 422 U. S. 853, 862, 95 S. Ct. 2550, 2555, 45 L. Ed. 2d 593 (1975), this Court articulated the supreme importance of closing arguments, even in a non-jury case.

> "And for the defense, closing argument is the last clear chance to persuade the trier of the fact that there may be reasonable doubt of the defendant's guilt. See *In Re Winship,* 397 U. S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368."

A fortiori, to deprive petitioner of the opportunity to have his counsel marshal the evidence before a jury, through a brazen form of obstructionism, was to deprive him of his Sixth Amendment right. Here again the supervisory power of the Court should have been exercised to deter such undignified conduct by at least ordering a new trial.

Conclusion.

For the foregoing reasons, either this petition for writ of certiorari should be granted since the affirmance below was clearly improper, or summary reversal should be ordered since the law has been settled by this Court's prior decisions which warrant a new trial, if not a dismissal of the indictment.

Respectfully submitted,

PAUL P. RAO, JR.,
Attorney for Petitioner.

APPENDIX A.

UNITED STATES COURT OF APPEALS

FOR THE

SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the sixteenth day of September one thousand nine hundred and eighty-one.

Present:

Honorable Irving R. Kaufman,
Honorable Walter R. Mansfield,
Circuit Judges,
Honorable Lawrence W. Pierce,
District Judge, sitting by designation.

UNITED STATES OF AMERICA,

Appellee,

v.

JOHN MARTENS,

Defendant-Appellant.

81-1176

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

1. Appellant has not shown prosecutorial misconduct sufficiently prejudicial to warrant reversal of his conviction, *United States v. Canniff,* 521 F.2d 565, 572 (2d Cir. 1975), cert. denied *sub nom. Benigno v. United States,* 423 U.S. 1059 (1976); *United States v. White,* 486 F.2d 204 (2d Cir. 1973), cert. denied, 415 U.S. 980 (1974), or dismissal of the indictment, *United States v. Artuso,* 618 F.2d 192 (2d Cir.), 101 S.Ct. 164 (1980).

2. The actions of the prosecutor during plea negotiations do not constitute a "deliberate attempt" to interfere with appellant's relationship with his attorney, but rather amount to legitimate attempts to convince appellant of the advisibilty of a guilty plea. *Cf. Bordenkircher v. Hayes,* 434 U.S. 357 (1978).

3. The Government did not abuse its subpoena power when it served grand jury subpoenas on Rita Fratrick and Mabel Kitty Dries but did not subsequently bring them before the grand jury in light of Fratrick's statement indicating that she intended to invoke her privilege against self-incrimination. *See*

United States v. Jacobs, 547 F.2d 772 (2d Cir. 1976), cert. granted, 431 U.S. 937 (1977), cert. dismissed, 436 U.S. 31 (1978).

4. Appellant's other claims of prosecutorial misconduct are without merit.

5. Judge Stewart acted within his discretion in sustaining objections to certain questions concerning the operation of the stress clinic asked by appellant's counsel when cross-examining Asherson, one of the government witnesses. A trial court may place reasonable limits on the scope of cross-examination. *United States v. Gleason*, 616 F.2d 2 (2d Cir. 1979), cert. denied, 444 U.S. 1082 (1980); *United States v. Clark*, 613 F.2d 391 (2d Cir. 1979), cert. denied, 101 S.Ct. 78 (1980).

6. Appellant's other claims with respect to Judge Stewart's evidentiary rulings are without merit.

IRVING R. KAUFMAN,
WALTER R. MANSFIELD,
Circuit Judges,
LAWRENCE W. PIERCE,
District Judge.

APPENDIX B.

Government's Pre-Trial Memorandum.

* * *

3. Description of February 27, 1981 Negotiations

On February 27, 1981, defendant John Martens and his attorney Paul Rao, Jr., attended a meeting at the request of Assistant United States Attorney Denise Cote in her office. Special Agent Edward Guillen of the Drug Enforcement Administration was also present. A.U.S.A. Cote explained that the purpose of the meeting was to discuss a plea by defendant Martens to one count with a maximum term of imprisonment of five years. As A.U.S.A. Cote added, she had learned from the two Assistant United States Attorneys with whom Martens and his previous attorney had met, that in the Fall of 1980, Martens had told them he was willing to plead guilty to a five-year Count, if he would not be permitted to plead guilty to a misdemeanor charge. Although the Government had refused to accept that offer in the Fall, Ms. Cote stated that if Martens indicated by the following Monday, March 2, 1981, that he was willing to enter such a plea, that plea would be accepted in satisfaction of the indictment.

Mr. Rao indicated that there would be no plea, that he is a trial attorney, and that he never accepted as clients people who he thought should plead. A.U.S.A. Cote responded that she had heard from others that Mr. Rao never had his clients plead guilty, but that the decision had to be made by Martens since it was Martens, and not his attorney, who would suffer the consequences. A.U.S.A. Cote assured Martens that the Government's willingness to accept his previous offer to plead to a five-year count did not mean that the Government felt the case against Martens was weak. In fact, Ms. Cote indicated that the case against

Martens was overwhelming.* There were circumstances which had nothing to do with John Martens, however, that prompted the Government to see if Martens was willing to plead guilty as he once had been.

* * *

*Mr. Rao indicated that there was a defense to the charges. It was at approximately this point that A.U.S.A. Cote and Mr. Rao discussed a recent case Mr. Rao had tried in the Southern District of New York. A.U.S.A. Cote pointed out that in a recent trial, one of Mr. Rao's clients had been convicted after Mr. Rao rejected a plea offer to 1 of the 3 counts in the indictment and that the defendant is now sitting in jail awaiting sentence. A.U.S.A. Cote indicated that that conviction occurred although there was only a brief tape recording of the defendant, unlike the many recordings of Martens, and that that defendant had not met an undercover officer as Martens had. Mr. Rao pointed out that his two trials before that in the Southern District of New York had not resulted in convictions, and that the second, in fact, was an acquittal.

APPENDIX C.

(Government's Exhibit 32.)

DC:cw
5/13/80

May 13, 1980

Jack S. Hoffinger, Esq.
Stephen L. Weiner, Esq.
Hoffinger, Friedland & Roth
10 East 53d Street
New York, New York 10022

Re: Ronald Asherson

Dear Messrs. Hoffinger and Weiner:

On the understandings specified below, the United States will accept a guilty plea from Ronald Asherson to an information charging him with one count of conspiring to distribute methaqualone, a controlled substance, in violation of Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(B), carrying a maximum sentence of five years imprisonment, a $15,000 fine, and a special parole term of two years to life. If he fully complies with these understandings, Ronald Asherson will not be prosecuted by this Office for any other potential drug offenses relating to the conspiracy described in the above-mentioned Information, or for other transactions relating to controlled substances between June 1, 1976, and March 13, 1980.

The understandings are that Ronald Asherson shall truthfully disclose all information with respect to the activities of himself and others concerning all matters about which this Office inquires of him, and further, shall truthfully testify before the Grand Jury and/or at any trial or other court proceedings with respect to any matter about which this Office may request his testimony.

It is further understood that it is contemplated and Ronald Asherson agrees, that this Office shall, if feasible, utilize Ronald Asherson's assistance in investigations being conducted by this Office and by law enforcement agencies relating to matters previously

discussed with this Office. During this investigative period, Ronald Asherson agrees to devote his reasonable and best efforts to assist the investigation being conducted by this Office and law enforcement agencies. He shall conduct such efforts only with the knowledge and under the supervision of this Office or law enforcement agencies.

It is further understood that the sentence to be imposed upon Ronald Asherson is within the sole discretion of the sentencing Judge. This Office cannot and does not make any promise or representation as to what sentence Ronald Asherson will receive, nor will it recommend any specific sentence to the sentencing Judge. However, this Office will inform the sentencing Judge and the Probation Department of (1) this Agreement; (2) the nature and extent of Ronald Asherson's activities with respect to this case; (3) the full nature and extent of Ronald Asherson's cooperation with this Office and the date when such cooperation commenced; and (4) all other information in its possession relevant to sentence.

It is further understood that this Agreement is limited to the United States Attorney's Office for the Southern District of New York, and cannot bind other federal, state or local prosecuting authorities from prosecuting Ronald Asherson, although this Office will bring the cooperation of Ronald Asherson to the attention of other entities, if requested by Ronald Asherson. The Immigration and Naturalization Service ("INS") has advised the United States Attorney's Office, after being informed of Ronald Asherson's alien status and the crime to which he has agreed to plead guilty, that the INS does not deport or exclude resident aliens for any crime in connection with the distribution of methaqualone.

It is further understood that Ronald Asherson must at all times give complete, truthful and accurate information and testimony and must not commit any further crimes whatsoever. Should Ronald Asherson commit any further crimes or should it be determined that Ronald Asherson has given false, incomplete or misleading testimony or information, has failed to exercise his reasonable and best efforts to assist the investigation or has otherwise violated any provision of this Agreement, Ronald Asherson shall thereafter be subject to prosecution for any federal criminal violation of which this Office has knowledge, including, but not

limited to, perjury and obstruction of justice. Any such prosecutions may be premised upon any information provided by Ronald Asherson and such information may be used against him.

Furthermore, it is agreed that in the event that it is determined that Ronald Asherson has violated any provision of this Agreement, (i) all statements made by Ronald Asherson to this Office or other designated law enforcement agents, or any testimony given by Ronald Asherson before a grand jury or other tribunal, whether prior to or subsequent to this Agreement, or any leads from such statements or testimony, shall be admissible in evidence in any and all criminal proceedings hereafter brought against Ronald Asherson and (ii) Ronald Asherson shall assert no claim under the United States Constitution, any statute, Rule 11(e)(6) of the Federal Rules of Criminal Procedure, Rule 410 of the Federal Rules of Evidence or any other federal rule, that statements made by him prior to or subsequent to this Agreement, or any leads therefrom, should be suppressed. It is the intent of this Agreement to waive any and all rights in the foregoing respects.

No additional promises, agreements and conditions have been entered into other than those set forth in this letter and none will be entered into unless in writing and signed by all parties.

Very truly yours,

WILLIAM M. TENDY
United States Attorney
By: DENISE COLE
Assistant United States Attorney

Approved:
JOHN H. DOYLE, III
Chief, Criminal Division

Agreed and Consented to:
RONALD ASHERSON
JACK S. HOFFINGER
Attorney for Ronald Asherson
STEPHEN L. WEINER
Attorney for Ronald Asherson

APPENDIX D.

(Defendant's Exhibit K.)

Complaint

Approved:

Mark F. Pomerantz
Assistant United States Attorney

Before:

Honorable Naomi Reice Buchwald
United States Magistrate,
Southern District of New York.

UNITED STATES OF AMERICA,

v.

JOHN MARTENS,

Defendant.

Violation of 21 U.S.C. §§ 812, 841(a)(1) and 841(b)(1)(A)

Southern District of New York, ss.:

EDWARD GUILLEN, being duly sworn, deposes and says that he is a Special Agent of the United States Drug Enforcement Administration and charges as follows:

That on or about the 30th day of April, 1980 in the Southern District of New York, John Martens, the defendant, unlawfully, intentionally and knowingly did distribute and possess with intent to distribute a Schedule II narcotic drug controlled substance, to

wit, approximately 200 hydromorphine (Dilaudid) tablets, in violation of Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A).

The bases for deponent's knowledge and for the foregoing charge are, in part, as follows:

1. On April 30, 1980, while acting in an undercover capacity as a wholesale drug dealer and a person with connections to organized crime, I purchased 200 4 mg. Dilaudid tablets from the defendant John Martens for $2000 in official advance funds. The transaction took place at 400 E. 56th St., in Manhattan.

2. John Martens is a licensed physician. At the time of the transaction, among other matters, Martens asked for an received assurances that I was not part of an "FBI trap."

WHEREFORE, deponent prays that a warranty may issue for the apprehension of the above named defendant and that he may be arrested and imprisoned, or bailed, as the case may be.

EDWARD GUILLEN
Special Agent

Sworn to before me this
12th day of August, 1980.
NAOMI REICE BUCHWALD
United States Magistrate

APPENDIX E.

(Government's and Defendant's Exhibit L.)

Consultant : (+ Penicillin) $35

2nd : B_{12} $5

B. Complex

Liver Extract

Benicillin (E) 2.4 mlu $40

2.4 mlu $40

G.C : Tribiotycin : $40.

G12).

Jewish Hosp :-

Cardiologist: Dr Norman Brachfeld:

Gastroenterologist: Dr Simmons Bank: Long Island Jewish

Liver: Dr Hochman: Park Ave

Dr DAVID Hushen: E 70's.

Orthopaedics: Dr Scuteo: Hos.-Special Surgery

Neurology: John Schaeffer. N.Y.H.

Ob/Gynae: Dr John Schea: Mount. Sinai: